



October 30, 2018

Florio Perruci Steinhardt & Fader, LLC
ATTN: Seth R. Tipton, Esq.
60 West Broad St., Ste. 102
Bethlehem, PA 18018

Re: Keystone ReLeaf, LLC v. Department of Health, Office of Medical Marijuana
Docket Nos. MM 17-095 D, 17-096 D

Dear Mr. Tipton:

Enclosed please find the Hearing Examiner's Proposed Report in the above-referenced matter. Either party has 30-days from the mailing date of this letter to file a Brief on Exceptions. 1 Pa. Code § 35.211. A Brief Opposing Exceptions may be filed within 20-days after the filing of a brief on exceptions. 1 Pa. Code § 35.211. All parties must file five copies of any brief. The required contents and maximum length of briefs is specified at 1 Pa. Code § 35.212. The rules concerning your appeal rights and filing Exceptions to the Memorandum Opinion Recommending Dismissal can be found in the General Rules of Administrative Practice and Procedures ("GRAPP"), 1 Pa. Code Chs. 31-35.

In order to be timely, documents must be received at the address listed below on or before the close of business on the due date.

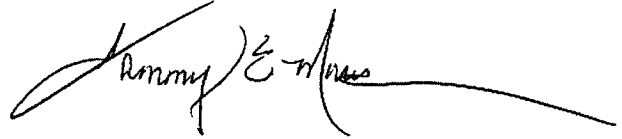
Tammy Morrison, Docket Clerk
Room 825 Health and Welfare Building
625 Forster Street
Harrisburg, PA 17120-0701

If the due date falls on a weekend or holiday, briefs must be filed before the close of business on the next business day. Any filing must also be served on the opposing party, or its counsel of record. Failure to timely file a brief on exceptions that complies with all requirements of GRAPP will constitute a waiver of any objection to the proposed report.

October 30, 2018

After receipt and consideration of timely filed briefs, the Secretary of Health or her designee will rule on any outstanding matters and issue a final order.

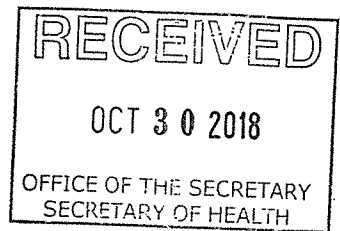
Sincerely,

A handwritten signature in black ink, appearing to read "Tammy E. Morrison", with a long horizontal flourish extending to the right.

Tammy E. Morrison
Docket Clerk

Enclosure

cc: Alison Taylor, Chief Counsel, Office of Legal Counsel
Jonathan D. Koltash, Senior Counsel, Office of Legal Counsel



**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH**

**KEYSTONE RELEAF, LLC.,
APPELLANT**

vs.

**DEPARTMENT OF HEALTH,
OFFICE OF MEDICAL MARIJUANA
APPELLEE**

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**DOCKET NO. MM 17-095 D
DOCKET NO. MM 17-096 D

(CONSOLIDATED)**

PROPOSED REPORT

**Jackie Wiest Lutz
Chief Hearing Examiner**

**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL
DEPARTMENT OF STATE
OFFICE OF HEARING EXAMINERS
P.O. Box 2649
Harrisburg, PA 17105-2649**

HISTORY

This matter is before the Deputy Secretary for Health Planning and Assessment (“Deputy Secretary”) on appeals filed by Keystone Releaf, LLC (Docket Nos. MM 17-095-D and MM 17-096 D)(“Appellant”) from two *Notices Denying Medical Marijuana Dispensary Permit Applications* dated June 29, 2017 from Director John J. Collins of the Department of Health’s Office of Medical Marijuana (“OMM”), which notified Appellant that the Medical Marijuana Dispensary Permit Applications (“Applications”) that Appellant submitted during Phase One of the implementation of the Medical Marijuana Program were denied.

Appellant was notified that the reason its applications were denied is because the OMM granted one dispensary permit with a primary dispensary location in Lehigh County, and one dispensary permit with a primary dispensary location in Northampton County where Appellant applied for permits, and that Appellant’s total score for its Lehigh County facility, which was 595.60, was lower than the top score of 648.00 in Lehigh County, and Appellant’s total score for its Northampton County facility, which was 596.20, was lower than the top score of 620.40 in Northampton County.

Appellant was notified that it may appeal the *Notice Denying Medical Marijuana Dispensary Permit Application* to the Secretary of Health within 10 days of the date of mailing of the notice.

On July 7, 2017, Seth R. Tipton, Esquire, on behalf of the Appellants, filed a timely *Notice of Appeal*. On July 17, 2017, Jonathan D. Koltash, Senior Counsel for the Department, filed the *Department of Health, Office of Medical Marijuana’s Answers to Appellant’s Notice of Appeal*.

On August 23, 2017, the Deputy Secretary designated the Pennsylvania Department of State, Office of Hearing Examiners, to act as the presiding officer for the Department of Health

("Department") in all proceedings to adjudicate appeals from orders or decisions issued by the Department's OMM.

On September 7, 2017, Jackie Wiest Lutz, Chief Hearing Officer, issued an *Order Scheduling Telephonic Pre-Hearing Conference*, which scheduled a telephonic pre-hearing conference for November 3, 2017, and directed the parties to file pre-hearing statements by October 27, 2017. The Hearing Officer thereafter issued a *Standing Practice Order* on September 19, 2018, to inform the parties of their responsibilities regarding the filing of pleadings, requests for continuances, the filing of briefs and other administrative matters.

On September 21, 2017, the Department filed the *Department of Health, Office of Medical Marijuana's Motion for a Continuance of the Prehearing Conference and Prehearing Statement*, requesting a 45-day continuance of the prehearing conference and the filing of its prehearing statement. An *Order Granting Continuance* was issued by the Hearing Officer on October 4, 2017.

On November 16, 2017, an *Order Re-Scheduling Telephonic Pre-Hearing Conference* was issued by the Hearing Officer, which re-scheduled the pre-hearing conference for January 2, 2018, and directed the parties to file pre-hearing statements by December 14, 2017. On January 3, 2018, following the filing of pre-hearing statements, and a telephonic pre-hearing conference, the Hearing Officer issued *Orders Scheduling Hearing and Deadlines for Action*, which scheduled the hearing on Docket No. MM 17-095 D for April 10, 2018, commencing at 9:00 a.m. at One Penn Center, 2601 N. Third Street, Harrisburg, PA, and the hearing on Docket No. MM 17-096 D for April 17, 2018, commencing at 9:00 a.m. at same location.

The hearing on Docket No. MM 17-095 D proceeded as scheduled on April 10, 2018 at the designated time and place. Robert M. Donchez, Esquire and Seth R. Tipton, Esquire

appeared on behalf of the Appellant. Jarad W. Handelman, Esquire and Thomas Elliott, Esquire, appeared on behalf of the Department's OMM.

At the end of the day on April 10, 2018, the parties jointly requested that the appeals filed to Docket Nos. MM 17-095 D and MM 17-096 D be consolidated for one hearing in the interest of judicial economy, and that the evidentiary record created during the administrative hearing held on April 10, 2018 be consolidated with and applied equally to the appeal filed at Docket No. MM 17-096 D.

On April 11, 2018, the Hearing Officer issued an *Order Granting Consolidation*, directing that the hearing scheduled for April 17, 2018 be treated as a 2nd day of hearing for these consolidated appeals. On the same date, the Hearing Officer issued an *Order Sealing Exhibit D-6* (Appellant's non-redacted Lehigh County Application) from public disclosure.

The second day of hearing proceeded as scheduled on April 17, 2018, and concluded that day. Following the hearing, the Hearing Officer also issued an *Order Sealing Exhibit D-6* (Appellant's non-redacted Northampton County Application), from public disclosure.

On May 17, 2018, the Hearing Officer issued an *Order Establishing Briefing Schedule*. Briefs were filed by the parties on June 29, 2018, August 13, 2018, and August 28, 2018, respectively, at which time the record closed.

FINDINGS OF FACT

(I) BACKGROUND

1. On April 17, 2016, Governor Wolf signed the Medical Marijuana Act (“Act”) into law, legalizing medical marijuana in the Commonwealth of Pennsylvania, and charging the Department with the responsibility to implement and administer the Act. (Official Notice¹- 35 P.S. §§10231.101, *et. seq.*)

2. The Act recognizes two types of medical marijuana organizations – grower/processors and dispensaries. (Official Notice - 35 P.S. §10231.601)

3. A grower processor is the entity that grows medical marijuana and processes it into the final forms that are approved by law. (N.T.² 14)

¹ Official notice of such matters as might be judicially noticed by courts is permissible under the General Rules of Administrative Practice and Procedure, 1 Pa. Code §31.1 *et. seq.*, at §35.173, which provides, in pertinent part, as follows:

§35.173. Official notice of facts.

Official notice may be taken by the agency head or the presiding officer of such matters as might be judicially noticed by the courts of this Commonwealth, or any matters as to which the agency by reason of its functions is an expert. . . .

1 Pa. Code §35.173.

Official notice is also permitted under case law. *See, for example, Falasco v. Commonwealth of Pennsylvania Board of Probation and Parole*, 521 A. 2d 991 (Pa. Cmwlth. 1987), in which the Commonwealth Court explained:

“Official notice” is the administrative counterpart of judicial notice and is the most significant exception to the exclusiveness of the record principle. The doctrine allows an agency to take official notice of facts which are obvious and notorious to an expert in the agency’s field and those facts contained in reports and records in the agency’s files, in addition to those facts which are obvious and notorious to the average person. Thus, official notice is a broader doctrine than is judicial notice and recognizes the special competence of the administrative agency in its particular field and also recognizes that the agency is a storehouse of information on that field consisting of reports, case files, statistics and other data relevant to its work.

521 A. 2d at 994 n. 6.

² “N.T.” refers to “notes of testimony” from the April 10, 2018 and April 17, 2018 administrative hearings.

4. A dispensary is akin to a pharmacy where a patient or caregiver goes to purchase medical marijuana and medical marijuana products. (N.T. 14)
5. To facilitate prompt implementation of the Act, the Act authorized the Department to promulgate temporary regulations to, *inter alia*, establish general provisions for operating the medical marijuana program, including the process to apply for a medical marijuana organization permit, and criteria that an applicant must meet before it may be awarded a grower/processor or dispensary permit. (Official Notice – 28 Pa. Code §§1141.21 – 1141.50)
6. The Department’s temporary regulations established six (6) medical marijuana regions: Southeast, Northeast, Southcentral, Northcentral, Southwest, and Northwest. (Official Notice – 28 Pa. Code §1141.24; N.T. 18; DOH Exhibits 1 (OMM 0001 and 0011))
7. During Phase I of the Department’s implementation of the Medical Marijuana Act, the Department announced its plan to issue up to 12 grower/processor permits and up to 27 dispensary permits; the Department published notice of this fact in the *Pennsylvania Bulletin*, in addition to notification that the Department would make available, on its website on January 17, 2017, the medical marijuana grower/processor and dispensary permit applications, inclusive of Application Instructions and Attachments. (DOS Exhibit 1; Official Notice – 47 Pa. B. 73 (January 7, 2017))
8. The Department’s OMM developed a dispensary permit application and a grower/processor application for interested applicants to complete. (DOH Exhibit 2)
9. Dispensary permit application instructions were included within the application and informed dispensary permit applicants that the OMM would consider the factors found in §603(a.1) of the Act and the various factors found in the temporary regulations. (DOH Exhibit 2)
10. The deadline for interested applicants to submit an application to the Department’s

OMM was March 20, 2017. (N.T. 21)

(II) **KEYSTONE RELEASE, LLC.**

11. Appellants submitted two dispensary permit Applications to the OMM by the established March 20, 2017 deadline; one Application was for Lehigh County, and one Application was for Northampton County. (N.T. 21, 80, 166; DOH Exhibits 6, pgs. OMM 0105-1257 (Docket No. MM 17-095 D) and OMM 0105-1247 (Docket No. MM 17-096 D))

12. Lehigh and Northampton Counties are in Medical Marijuana Region 2. (N.T. 18)

13. Every application that came into the OMM went through an *intake process*, where Department personnel opened every submission to ensure that there was an electronic submission of the application, all attachments were attached, proof of mailing was included, and all appropriate fees were included; and an *assessment phase*, where a member of the OMM reviewed the application to ensure that it was complete, i.e., that every yes or no question was answered, that every signature that was required was provided, and that every page that required a notary seal had a notary seal. (N.T. 22-23)

14. Applications that were incomplete were rejected; completed applications were forwarded on to the evaluation committee, a/k/a scoring committee, for scoring. (N.T. 23-25, 38)

15. Appellant's Applications were complete; the scoring committee scored both Applications. (Transcript, *passim*)

16. Appellant's Applications were nearly identical in content except for the location of the property. (Stipulation of counsel, transcript, p. 250; DOH Exhibits 6, pgs. OMM 0105-1257 (Docket No. MM 17-095 D) and OMM 0105-1247 (Docket No. MM 17-096 D))

17. Appellant scored 595.60 points on its Lehigh County Application, and 596.20 points on its Northampton County Application; the best scores in these corresponding regions were

648 points (Lehigh County) and 620.40 points (Northampton County), respectively. (DOH Exhibits 7)

18. By letter dated June 29, 2017, the Director of the OMM notified Appellant that its Applications were denied, and of the procedure for filing an appeal. (DOH Exhibits 7)

19. Appellant filed timely appeals from both denials; consolidated hearings were held on April 10, 2018 and April 17, 2018. (Transcript; *passim*)

20. Sunny Podolak ("Ms. Podolak") is the Assistant Director for the Department's OMM, and served as the Chair of the Evaluation/Scoring Committee. (N.T. 12-13)

21. The OMM provided a 2-day training to the members of the scoring committee. (N.T. 27)

22. The purpose of the training was to ensure that scoring committee members understood the Medical Marijuana Act and Temporary Regulations, and how to review the permit applications and provide consistent and fair scoring. (N.T. 29, 32-33)

23. On day one of the training, the scoring committee members received a PowerPoint presentation that included an overview of the medical marijuana program, regulations, evaluation process, and goals and responsibilities of members of the scoring committee. (N.T. 29-30; DOH Exhibits 5)

24. Scoring committee members were explained, *inter alia*, how to review each application; that they were not to discuss the applications or scoring with anyone, including other committee members, outside of the evaluation committee meetings; that they were not to compare applications; that all determinations must be based only on the application, with the directive, "DO NOT consult outside resources"; that they were to provide an initial score when they read the application; and that when they come to the committee meeting, they will have a discussion on

each application and provide a final score. (N.T. 30, 33, 35-36; DOH Exhibits 5)

25. The scoring committee members were trained to read each application on their own and provide an initial score. (N.T. 33; DOH Exhibits 5)

26. The PowerPoint presentation contained a slide entitled, "Standardized scoring" that contained the number of points available for each section of the application and five categories: a) Exceeds Expectations; b) Better Than Average; c) Meets Expectations; d) Below Expectations and e) Not Acceptable, with a range of scores assigned to each category so that if one scoring committee member evaluated an application that the member felt fell within the exceeds expectations category, the score assigned to that application would not be that variant from another scoring member who scored the application within the same category. (N.T. 31-32; DOH Exhibits 5, p. OMM 0093)

27. The standardized scoring rubric was designed to promote a measure of consistency for scoring committee members. (N.T. 32)

28. The scoring committee members were not provided specific guidance on how to use or award points pursuant to the standardized scoring rubric. (N.T. 70-73)

29. On day two of the training, members of the scoring committee gave presentations on their "subject-matter expertise" to other members of the committee; committee members also reviewed a redacted application to give them an idea of what a completed application would look like. (N.T. 36)

30. The two-day training is the only training that was provided to the scoring committee. (N.T. 61)

31. After the training was completed, each committee member was provided a binder that contained a copy of the law and regulations, blank copies of the application and instructions

and attachments, and a copy of the PowerPoint as a resource guide. (N.T. 37)

32. Ms. Podolak created a thumb drive of approximately 25 applications/week for each scoring committee member, along with a schedule of the applications that were going to be reviewed during a meeting; a scoring worksheet was placed on the thumb drive for the committee members to use as they scored applications on their own. (N.T. 41-42, 82-85; DOH Exhibits 4-a)

33. Ms. Podolak gave the scoring committee members their thumb drives on Thursdays; they would then meet twice a week the following week, generally on a Tuesday and Thursday, for approximately three hours. (N.T. 82-83, 94-95)

34. The scoring committee members scored the permit applications individually, prior to the meetings, and then would come to the meeting with all other committee members and discuss each permit application. (N.T. 45-46; DOH Exhibits D-5, pgs. OMM 0094-0095)

35. The scoring committee members would ask questions of each other, and discuss strengths and weaknesses of the permit applications. (N.T. 47)

36. After the discussions, Ms. Podolak would pass out the evaluation score sheet, and ask the members to record their final scores; members were able to increase or decrease their scores depending on the discussions that occurred. (N.T. 47-48)

37. Ms. Podolak would then collect all final score sheets and advise the committee that they have completed their review of the application; she would then move on to the next application, and the committee would start the discussion on that application. (N.T. 47-48)

38. Except for the Diversity and the Community Impact sections of the application, scoring committee members were asked to review the entire application, and to come to the meetings prepared to have a discussion with their initial score. (N.T. 48-49, 68, 88)

39. An average dispensary application contained a minimum of hundreds of pages, but

some were over 1,000 pages; some pages contained pictures or just required an applicant to check a box. (N.T. 87-88, 117-118)

40. Appellant's Applications were both over 1,100 pages in length. (N.T. 113; DOH Exhibits 6)

41. Art McNulty ("Mr. McNulty"), a local government policy specialist for the Department of Community and Economic Development ("DCED"), and other scoring committee members from DCED, are the only scoring committee members who scored the Community Impact section of the application. (N.T. 68, 138, 156-157)

42. Mr. McNulty and the other scoring committee members from DCED, scored every other section of the application except the Diversity section. (N.T. 156)

43. Scoring committee members were not asked to sign anything certifying that they reviewed the applications in full, and Ms. Podolak did not verify or ask the scorers if all pages of the application had been reviewed. (N.T. 93-94)

44. Appellant's Applications were among the approximate 25 applications/week that were provided to the scoring committee members who were to meet and discuss the applications approximately four business days later. (N.T. 113)

45. The feedback that Ms. Podolak received from the scoring committee members was that 20-25 applications/week was a manageable amount. (N.T. 86)

(A) Diversity

46. The Diversity section of the application was worth 100 points, or 10% of the application. (N.T. 69, 269, 279, 329; DOH Exhibits 1, pgs. 0008 – 0010)

47. DeShawn Lewis ("Ms. Lewis"), Director for Diversity and Inclusion and Small Business Opportunities within the Commonwealth of Pennsylvania, Department of General

Services, was the only person on the scoring committee that scored the Diversity section of the application; Ms. Lewis did not score any other section of the application except for Diversity. (N.T. 44, 68, 259-262, 278, 329)

48. Ms. Lewis did not use the standardized scoring rubric provided to her during training to score the Diversity section of the application, or consider the different categories in the scoring allocation guide; instead, Ms. Lewis, with the assistance of the Department of General Service's legal office, developed her own scoring rubric. (N.T. 267, 275, 350-352; DOH Exhibits 4b)

49. Although the PowerPoint training that was provided to the scoring committee members specifically instructed members, "DO NOT discuss the applications or scoring with anyone, including other committee members, outside of the Evaluation Committee meetings," Ms. Lewis used up to five people in her department to assist her in reviewing the Diversity section of the application. (N.T. 276, 310-312, 315-316, 392-394, 401-402; DOH Exhibits 5, p. OMM 0103)

50. No applicant had access to the diversity scoring rubric used by Ms. Lewis or the criteria that was being considered by Ms. Lewis. (N.T. 357)

51. When Ms. Lewis received the applications via thumb drive weekly, she printed the applications off the thumb drive for the individuals in her office who were assisting her in her review of the applications. (N.T. 394)

52. Ms. Lewis does not recall if she distributed the Medical Marijuana Act and regulations to any of the individuals who assisted her in her review of the applications. (N.T. 402)

53. The people that Ms. Lewis used in her department to assist her in reviewing the applications read the applications, and provided their thoughts about different parts of the application, including scores or where they felt the applicant fell within the rubric; Ms. Lewis took

into consideration the views of the individuals who assisted her, but, ultimately made the final decision as to a score for each application. (N.T. 276-277; 310-311)

54. The people who assisted Ms. Lewis in scoring were not part of the scoring committee; did not receive the PowerPoint training; and did not sign any form of acknowledgment of their confidentiality obligations. (N.T. 277-278, 395-396, 402)

55. Ms. Lewis does not recall if the OMM gave her permission to utilize other people in the scoring process, and concedes that the OMM might have been unaware that she was sharing the applications with others. (N.T. 314-315)

56. The scoring rubric developed by Ms. Lewis, with the assistance of the Department of General Service's legal office, was broken down into two sections worth 75 points and 25 points, respectively. (N.T. 269-270; DOH Exhibits 4b)

57. The first section of the scoring rubric was titled "Diversity practices" and focused on the applicant's internal company makeup, including ownership, management, and employment, as well as efforts taken by the applicant to promote diversity in the community. (N.T. 269-270; DOH Exhibits 4b)

58. The second section of the scoring rubric was titled "Subcontracting with Diverse Groups," which was defined to include disadvantaged businesses, minority-owned businesses, women-owned businesses, service-disabled veteran-owned small businesses, and veteran-owned small businesses that have been certified by a third-party certifying organization. (N.T. 269-270; DOH Exhibits 4b)

59. Appellant's score for Diversity was 32 points out of 100. (N.T. 284; DOH Exhibits 7)

(B) Personal Identification Information

60. The Personal Identification section of the dispensary permit application was worth 50 points or 5% of the overall score. (N.T. 110, 112, 169; DOH Exhibits 1, pgs. 0008 – 0010; DOH Exhibits D-3, OMM 0045)

61. Scoring committee members were not provided training on how to evaluate the personal identification section. (N.T. 111)

62. Mr. McNulty likened the five categories of the standardized scoring rubric to an A through F grade. (N.T. 149)

63. To McNulty, “exceeds expectations” was the equivalent of an “A;” “better than average” was a “B;” “meets expectations” was a “C;” and “not acceptable” was an “F.” (N.T. 149, 197)

64. Appellant provided identical information in both of its Applications, but received a score of 36.40 in the Personal Identification section for its Lehigh County application, and a score of 31.40 for its Northampton County application. (DOH Exhibits D-7 – OMM 1260 and OMM 1250)

65. Factors that impacted Mr. McNulty’s scoring of the Personal Identification section of the dispensary permit application included whether the Application included as an attachment a valid identification and resume’ for each employee or investor listed, as required by the Application instructions. (N.T. 170-171; DOH Exhibits 3, OMM0045)

66. Mr. McNulty recalls that Appellant’s Applications contained no personal identification or resume’ for Nicholas Chaffier, who is listed as being among Appellant’s Executive Team, but cannot state for certain whether that was a reason that he gave Appellant’s Applications a reduced score. (N.T. 174-175, 203; DOH Exhibits 6, OMM0235 – OMM0241)

67. Mr. McNulty recalls that Appellant's Applications mentioned that it assembled a Scientific Advisory Board consisting of approximately seven individuals, to foster its development and ensure that its goals and objectives are always aligned with its business processes and practices, but no personal identification or resume' was provided for any of these individuals. (N.T. 176; DOH Exhibits 6, OMM 0244 – 0245)

68. Mr. McNulty recalls that Appellant's Application lists financial backers on pages OMM 0466 through 0468, but no personal identification or resume' was included for Sollott Investments LLC. (N.T. 176; DOH Exhibits 6 OMM 0466 – 0468)

69. Mr. McNulty also recalls that Appellant included some expired identifications and that some identification cards were difficult to read; although these are factors that impacted McNulty's scoring of this section, he cannot definitively state a reason for his score deduction, because he does not recall what score he gave the Appellant's Applications. (N.T. 177-178, 203)

70. The record is devoid of information to establish what factors other scoring committee members considered in scoring the Personal Identification section of the dispensary permit application. (Transcript, *passim*)

(C) Site and Facility Plan

71. The Site and Facility Plan of the dispensary permit application was worth 50 points or 5% of the overall score. (DOH Exhibits 1, pgs. 0008 – 0010; DOH Exhibits 7, pgs. OMM 1250 and OMM 1260)

72. Appellant scored 35.40 out of 50 points on its Site and Facility Plan for its Lehigh County facility. (N.T. 179; DOH Exhibit 7, p. OMM 1260)

73. Mr. McNulty had an issue with Appellant's Site and Facility Plan for its Lehigh County facility because McNulty did not observe any type of security overlay, meaning

documentation of where the security cameras would be and where emergency lights would be; however, on cross-examination, Mr. McNulty admitted he was mistaken. Appellant's Application **did** have a security overlay as part of its application. (N.T. 181, 209; DOH Exhibit 6, p. OMM 1140)

74. Mr. McNulty also had an issue with Appellant's security personnel because the security personnel were not Appellant's employees; however, Appellant's Application states that Appellant's security surveillance system will be designed, installed and implemented by Appellant's technology partner SDI "*with the Security Officers serving as contractual employees of Appellant from a nationally recognized, accredited and licensed PA Private Security Contractor managed by Security Officers who will be trained, tested and certified to operate the entire Genetec Security Center Solution.*" (N.T. 209; DOH Exhibit 6, pgs. OMM 0215 and 0216)

75. The record is devoid of information to establish what factors other scoring committee members considered in scoring a dispensary permit applicant's Site and Facility Plan. (Transcript, *passim*)

(D) Capital Requirement

76. The Capital Requirements section of the dispensary permit application (section 22) was worth 75 points. (N.T. 182; DOH Exhibits 1, pgs. 0008 – 0010)

77. Appellants received a score of 60.60 for Capital Requirements for its Lehigh County Application, and a score of 61.80 for its Northampton County Application. (DOH Exhibits 7, pgs. OMM 1260 and OMM 1250)

78. The minimum capital requirement that the Act and the Department's temporary regulations prescribe for an applicant for a dispensary permit is \$150,000. (N.T. 183; Official Notice – 35 P.S. §10231.607(2)(vi); 28 Pa. Code §1141.30(b))

79. Appellant's Applications state that Appellant has \$6,900,000.00 in cash on deposit with Wells Fargo Bank, and that these funds:

"will be immediately released to [Appellant] upon award of a Permit to [Appellant] in accordance with an escrow agreement between [Appellant], its investors, and Wells Fargo. Consequently, the moment that the DOH grants [Appellant] a Permit, [Appellant] can access cash to begin operations to meet the criteria set by the DOH for opening our dispensaries."

(DOH Exhibits 6, pgs. OMM 0264 and OMM 0267)

80. If a dispensary applicant's application disclosed that the applicant had only the statutory minimum of \$150,000 in capital, Mr. McNulty would have scored that application an F – below expectations. (N.T. 184, 225)

81. Mr. McNulty did not give Appellants a perfect score for Capital Requirements because Appellant's funds were "not as liquid" as he would like them to be; in addition, Appellants applied for three dispensary locations on its applications so Appellant's \$6,900,000.00 would have to be spread among those three dispensary locations. (N.T. 185, 229)

82. In McNulty's opinion, "anything outside of cash in the bank not subject to any agreement would be looked at as a minus." (N.T. 214)

83. The record is devoid of information to establish what factors other scoring committee members considered in scoring the Capital Requirements section of the dispensary application that would have resulted in a reduced score. (Transcript, *passim*)

(E) Community Impact

84. Mr. McNulty and other members of the scoring committee from DCED who scored the Community Impact section of the Application developed a scoring rubric for this section of the Application. (N.T. 157; DOH Exhibits 4c)

85. Although the “Team ‘Code of Conduct’” portion of the PowerPoint training that was provided to the scoring committee members specifically instructed members, “All determinations are based only on the application – DO NOT consult outside resources,” Mr. McNulty and other members of the scoring committee from DCED consulted the U.S. Census and unemployment statistics to create its internal scoring rubric for Community Impact. (N.T. 220; DOH Exhibits 5, p. OMM 0102)

86. For site location, the DCED scoring members were looking for the medical marijuana organization to choose a site that was the redevelopment of a previously used building or site that was located in an underprivileged municipality and a municipality that was struggling financially. (N.T. 161)

87. The scoring rubric automatically awarded 30 points out of 100 if a dispensary was located in an Act 47 Municipality. (N.T. 214-215; DOH Exhibits 4c)

88. Unlike the Grower Processor Permit Application, the Dispensary Permit Application does not contain a box for an applicant to check to indicate whether their dispensary is in an Act 47 Municipality. (N.T. 215-217; DOH Exhibits 2 and 6)

89. Neither the Dispensary Permit Application nor its instructions notified applicants that 30 out of 100 points would be awarded to applicants whose dispensaries are in an Act 47 municipality. (N.T. 217-218, 222-223)

90. The scoring rubric created by Mr. McNulty and other members of the scoring committee from DCED awarded 15 points if the project was in a county or municipality that has an unemployment rate 25% or greater than the state average; less points were awarded for a county or municipality that has an unemployment rate of 1 to 24% above the state average. (N.T. 223-224; DOH Exhibits 4c)

91. Neither the Dispensary Permit Application nor its instructions notified applicants that 15 points would be awarded if the project was in a county or municipality that has an unemployment rate 25% or greater than the state average. (N.T. 223-224)

CONCLUSIONS OF LAW

1. Appellant was notified of the decision of the OMM to deny its Dispensary Permit Applications, and was provided an opportunity to appeal the OMM's decision, and to be heard in accordance with the Administrative Agency Law, 2 Pa. C.S. § 504. (Findings of Fact Nos. 11, 17-19)

2. An applicant for a permit, license or certificate bears the burden of proving that it meets all the qualifications necessary for obtaining a permit, license, or certificate. *Barren v. State Board of Medicine*, 670 A. 2d 765, 767 (Pa. Cmwlth. 1996), *appeal denied*, 679 A. 2d 230 (Pa. 1996).

3. The level of proof required to establish a case before an administrative tribunal in an action of this nature is a preponderance of the evidence. *Lansberry v. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

4. A preponderance of the evidence is generally understood to mean that the evidence demonstrates a fact is more likely to be true than not to be true, or if the burden were viewed as a balance scale, the evidence is sufficient in weight to "tip the scales on the side of the plaintiff," *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854, 856 (Pa. 1950), and lead the fact-finder to find that the existence of a contested fact is more probable than its nonexistence. *Sigafoos v. Pennsylvania Board of Probation and Parole*, 503 A. 2d 1076, 1079 (Pa. Cmwlth. 1986).

5. Significant errors and irregularities, contrary to the Act and the Department's temporary regulations, occurred during the scoring of Appellant's dispensary permit

Applications to warrant a re-score of Appellant's dispensary permit Applications. (Findings of Fact Nos. 11, 16-17, 20-91)

6. Appellant satisfied its burden of proof. (Findings of Fact Nos. 11-16, 20-91; Transcript, *passim*)

DISCUSSION

(I) BACKGROUND

Pennsylvania's Medical Marijuana Act,³ which became effective May 17, 2016, was enacted by the General Assembly to provide relief, through a medical marijuana program, to patients suffering from "serious medical conditions."⁴

The Act places responsibility with the Department to, *inter alia*, implement and administer the medical marijuana program, and issue permits to medical marijuana organizations to authorize them to grow, process or dispense medical marijuana. 35 P.S. §10231.301. To aid in its administration of the Act, the Department is authorized to promulgate regulations necessary to carry out the Act, including temporary regulations, to facilitate the prompt implementation of the Act. 35 P.S. §10231.1107. Consistent with this authority, the Department promulgated temporary regulations (28 Pa. Code §§1141.27-1141.34) that established six medical marijuana regions, 28 Pa. Code §1141.24, and notified interested persons that it will not initially issue permits to more than 25 applicants for grower/processor permits, or to more than 50 applicants for dispensary permits. 28 Pa. Code §1141.23.

On January 7, 2017, the Department published a notice in the *Pennsylvania Bulletin* advising interested persons that it will be issuing up to twelve (12) grower/processor permits and

³ Act of April 17, 2017, P.L. 84, 35 P.S. §§10231.101 – 10231.2110.

⁴ The phrase, "serious medical conditions," is defined by the Act to mean cancer; positive status for human immunodeficiency virus or acquired immune deficiency syndrome; amyotrophic lateral sclerosis; Parkinson's disease; multiple sclerosis; damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity; epilepsy; inflammatory bowel disease; neuropathies; Huntington's disease; Crohn's disease; post-traumatic stress disorder; intractable seizures; glaucoma; sickle cell anemia; severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain in which conventional therapeutic intervention and opiate therapy is contraindicated or ineffective; and autism. 35 P.S. §10231.103.

27 dispensary permits in Phase One of its implementation of the Medical Marijuana Program; and that it will make available on its website on January 17, 2017, the medical marijuana grower/processor and dispensary permit applications, including Application Instructions and Attachments.

Between February 20, 2017 and March 20, 2017, the Department received 457 applications for grower/processor and dispensary permits. Pertinent to this appeal, of the 457 applications received, two were dispensary permit applications in Region 2 from the Appellant for Lehigh County and Northampton County, respectively.

By letter dated June 29, 2017, the Director of the OMM notified Appellant that its Applications were denied. Appellant filed timely appeals from both denials.

(II) BURDEN OF PROOF

An applicant for a permit, license or certificate bears the burden of proving that it meets all the qualifications necessary for obtaining a permit, license, or certificate. *Barren v. State Board of Medicine*, 670 A. 2d 765, 767 (Pa. Cmwlth. 1996), *appeal denied*, 679 A. 2d 230 (Pa. 1996). The level of proof required to establish a case before an administrative tribunal in an action of this nature is a preponderance of the evidence, which is the same degree of proof as used in most civil proceedings. *Lansberry v. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990); *Millcreek Manor v. Dep't of Pub. Welfare*, 796 A. 2d 1020 (Pa. Cmwlth. 2002); *Pa. State Police v. Slaughter*, 138 A. 3d 65 (Pa. Cmwlth. 2016); *Pa. State Police v. Slaughter*, 138 A. 3d 65 (Pa. Cmwlth. 2016).⁵

⁵ The OMM incorrectly asserts in its *Proposed Conclusions of Law* that the burden is on Appellant to establish that the OMM's decision was unconstitutional, an error of law has been committed, or the necessary findings are not supported by substantial evidence. This standard of review, known as "the substantial evidence standard," is an appellate standard of review. Appellant and OMM both suggest throughout their briefs that the Appellant has the

A preponderance of the evidence is generally understood to mean that the evidence demonstrates a fact is more likely to be true than not to be true, or if the burden were viewed as a balance scale, the evidence is sufficient in weight to “tip the scales on the side of the plaintiff,” *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854, 856 (Pa. 1950), and lead the fact-finder to find that the existence of a contested fact is more probable than its nonexistence. *Sigafoos v. Pennsylvania Board of Probation and Parole*, 503 A. 2d 1076, 1079 (Pa. Cmwlth. 1986).

The burden is therefore on the Appellant to present evidence sufficient in weight to “tip the scales on the side of the Appellant” that the OMM’s scoring of its dispensary permit Applications was erroneous, contrary to the requirements of the Act, and the Department’s temporary regulations, 28 Pa. Code §§1131.1 – 1181.32.

(III) DELEGATION OF POWERS

The authority granted to the Hearing Officer by the Department’s Deputy Secretary, Health Planning and Assessment, is limited. The Office of Hearing Examiners is authorized:

[t]o make recommendations to dismiss appeals on jurisdictional or procedural grounds, deny in whole or in part or grant in whole or in part any appeal. The Office of Hearing Examiners is not authorized to adjudicate constitutional issues or to recommend that the Department issue a permit, but may recommend any other relief authorized by law, including that the Agency Head order the Office of Medical Marijuana to score a particular application or to re-score a particular application in accordance with the Medical Marijuana Act.

(IV) KEYSTONE RELEAF, LLC

The difference between Appellant’s score on its Lehigh County Application and the top

burden to establish an “abuse of discretion” by the OMM that could support a reversal of the denial of Appellant’s Applications. This, too, is an appellate standard of review. *Millcreek Manor v. Dep’t of Pub. Welfare*, 796 A. 2d 1020 (Pa. Cmwlth. 2002).

score of the applicant who was awarded a dispensary permit for Lehigh County was 52.4 points. The difference between Appellant's score on its Northampton County Application and the top score of the applicant who was awarded a dispensary permit for Northampton County was only 24.2 points. Appellant therefore challenges OMM's scoring of its Applications, arguing that the scoring process was arbitrary, and that the OMM repeatedly abused its discretion by: (A) exercising unreasonable judgment in that it: i) failed to provide adequate training to scoring committee members; ii) failed to provide adequate time for scorers to read and score all applications; iii) failed to establish uniform scoring standards; and (B) misapplied and overrode the Act and temporary regulations by: i) allowing scorers to impose standards and criteria not found within the Act or temporary regulations; and ii) allowing scorers to violate requirements of the Act and temporary regulations. Appellant further argues that the proposed remedy of a rescore does not provide meaningful relief. These arguments will be addressed *seriatim*.

(A) UNREASONABLE JUDGMENT

(i) Inadequate Training

Appellant first argues that the scorers received only a two-day "crash course" before scoring applications; that scorers had no other experience with medical cannabis or a prior understanding of the Act and temporary regulations; that applications were allegedly scored pursuant to a rubric without any training provided to the scorers on how to use or award points pursuant to the scoring allocation guide; that there was no criteria for scoring the Personal Identification section of the Application, leaving scoring at the complete discretion of the scorers, which allowed for a range of scores; and, that the only training provided by the OMM regarding the Diversity Section was one sentence on one PowerPoint slide that restated a small portion of the section of the regulations entitled "Diversity Goals." Appellant asserts that the OMM's "failure

to provide adequate training,” resulted in numerous scoring errors that negatively impacted Appellant’s final scores, and caused Appellant to not receive a permit.

OMM responds that absent Appellant’s bald assertions, the record is devoid of evidence to support a finding that OMM’s *training of the scorers* was inadequate. The OMM further contends that Appellant has not identified a single scoring error applicable to its Applications that was entitled to a higher score than that assigned by the scoring committee, and that Appellant has provided no proof that any section of its Applications was evaluated or scored any differently than any of the more than 450 applications received by OMM.

The evidence reveals that the OMM provided a two-day training to members of the evaluation committee, to ensure that the members understood the Act and temporary regulations, and how to review the permit applications and provide consistent and fair scoring. The PowerPoint presentation to which Appellant refers occurred on day one of the training, and included an overview of the medical marijuana program, the temporary regulations, the evaluation process, and the goals and responsibilities of the members of the evaluation committee. Ms. Podolak testified that during day one of training, committee members were told how often they would meet, and how to review each application. Committee members were instructed not to discuss the applications or scoring with anyone, including other committee members, outside of the evaluation committee meetings; that they were not to compare applications; and that they were not to consult outside resources. Ms. Podolak explained that the PowerPoint slide pertaining to “Standardized scoring” set forth the total number of points that are available for each section of the application, and was designed to promote a measure of consistency with the Scoring Committee’s evaluation.

Ms. Podolak further testified that on day two of the training, members of the evaluation committee gave presentations on their subject-matter expertise to the other members of the

committee. Committee members also reviewed a redacted application to give them an idea of what a completed application would look like. Scoring committee members were then provided with a binder that contained a copy of the law and regulations, blank copies of the applications and the instructions and attachments, and a copy of the PowerPoint as a resource.

Ms. Podolak testified that the scoring rubric that was part of the PowerPoint presentation contained the number of points available for each section of the application and five categories: a) Exceeds Expectations; b) Better than Average; c) Meets Expectations; d) Below Expectations, and e) Not Acceptable, with a range of scores assigned to each category. Ms. Podolak admitted on cross-examination that scoring committee members were not provided specific instruction on how to use or award points pursuant to this rubric. Mr. McNulty testified that he likened the five categories of the standardized scoring rubric to an A through F grade, with “exceeds expectations” being an “A”, and “not acceptable” being an F, but the record is devoid of evidence to establish how other scoring committee members used this rubric. Ms. Lewis, the only other scoring committee member who testified, did not use this rubric; she created her own.

The Hearing Officer agrees with the OMM that the *overall training* provided to its scoring committee members was adequate. As the OMM correctly observes, neither the Act nor the temporary regulations prescribe training requirements for scorers, and the training that was provided was intended to “provide a thorough, unbiased assessment of the submitted applications.” (DOH Exhibit 5, OMM 0083) Although it is difficult to reconcile how committee members assigned scores within the “better than average” category, when “they were not to compare applications,” and it is troubling that scoring committee members were provided a rubric to use in its scoring, with no guidance or instruction on how to use or award points pursuant to this rubric, the rubric, which was designed to promote a measure of consistency for scoring committee

members, appears to have accomplished that objective with Appellant's two Applications, which had only a 0.6 point variance.

It is concerning, though, as Appellant asserts, that the Personal Identification section of the dispensary permit application (Attachment E) was worth 50 points of an applicant's total score, and Ms. Podolak also conceded on cross-examination that scoring committee members were not provided training on how to evaluate this section. The evidence reveals that Appellant scored 36.40 out of 50 points on its Lehigh County Application, and 31.40 out of 50 points on its Northampton County Application. The evidence does not establish how these scores were assigned, or why the disparity in scores between the Appellant's two Applications.

While it is true, as OMM argues, that Appellant has not identified a specific *scoring error* associated with the training that was provided to scoring committee members, that was impossible for Appellant to do because, until the administrative hearing, Appellant was not provided with any information about why its Applications received the scores that they did. Moreover, only two scoring committee members testified. Of the scorers who did testify, one (Ms. Lewis) only scored the Diversity section of the Application and used her own scoring rubric. Mr. McNulty, who likened the categories of the scoring rubric to an A through F grade, could not positively identify any deficiency in Appellant's Applications that resulted in a reduced score, because he could not recall the score that he gave. (*See*, N.T. 203, 205, 209, 214, 222)

For reasons that will be discussed in more detail, *infra.*, Appellant has raised genuine concerns *specific to Appellant's Applications* that call into question the adequacy of the scores it received. With only a 24.2-point differential between Appellant's score and the top score of the applicant who was awarded a dispensary permit for Northampton County, and a 52.4-point differential between Appellant's score and the top score of the applicant who was awarded a

dispensary permit for Lehigh County, Appellant has identified several irregularities relating to scoring and/or the scoring process throughout its appeal that, when viewed in totality, weigh in favor of reevaluation.

(ii) *Inadequate Time for Scorers to Read and Score all Applications*

Appellant next argues, “the sheer numbers and common-sense demonstrate that the scorers were given an impossible timeline in which to complete their task.” (Appellant’s Brief, p. 22) This argument is academic. But, when viewed against the totality of the evidence, it too raises questions about how thoroughly applications were reviewed, and the accuracy and soundness of Appellant’s score.

The following facts are undisputed:

- The OMM received 457 applications;
- Some applications contained over 1,000 pages;
- *Appellant’s Applications were both over 1,100 pages in length;*
- An average dispensary application contained a minimum of hundreds of pages;
- The scoring committee met twice a week, generally on a Tuesday and a Thursday;
- Ms. Podolak provided 20-25 applications at a time to the scorers via a thumb drive on a Thursday, and provided the scorers with a schedule in advance so they would know which applications would be reviewed on Tuesday, and which ones would be reviewed on Thursday;
- Scoring committee members were not asked to sign anything certifying that they reviewed the applications in full, and Ms. Podolak did not verify or ask the scorers if all pages of the application had been reviewed.

Against these numbers, the evidence reveals that some application pages contained pictures or simply required an applicant to check a box; Mr. McNulty and Ms. Lewis testified that they had sufficient time to read each application in full and provide a score; and, the feedback that Ms. Podolak received from the scorers was that 20-25 applications/week was a manageable amount. However, as stated, *supra.*, no scorers other than Mr. McNulty and Ms. Lewis testified. Ms. Lewis’ testimony is not accorded substantial weight because the only section of the applications that she

reviewed and scored was the Diversity section, and she had assistance with that.

The sheer volume of pages comprising the applications that the scoring committee members were required to read, comprehend, evaluate, and then dutifully and appropriately score in this small window of time was extremely massive. As Appellant states, “[a]lthough the OMM believed this to be a manageable workload for its scorers, . . . the scorers’ task. . . [was] to score anywhere from 2,000 to 25,000 pages of applications, and as many as 1,000 pages an hour for eight hours a day during the evaluation period. (Brief of Appellant, p. 23) OMM counters that the arithmetic counsel for Appellant proffers is proof of nothing, and that its hollow criticism of the amount of time scorers had to read and review applications has no connection whatsoever to the actual scoring of Appellant’s applications,⁶ but the Hearing Officer disagrees. People are human, and people become fatigued. Appellant’s Applications alone exceeded 1,100 pages. As Appellant suggests, given the vast number of pages that the scorers were required to read, comprehend, and then score in such a short period of time, scoring errors were likely made. It matters not, as OMM argues, that this same process was followed for every application that was reviewed by the scoring committee members, because *the only applications at issue in this appeal are Appellant’s Applications*. As Appellant correctly observes,

“[t]his is no small task, as Keystone, for example, had 35 financial backers, some of which were groups of individuals. . . Even if some pages of the applications contained pictures or graphics that did not require reading, it takes time to flip or scroll through so many pages, and it also takes time to close one application and open another.”
(Appellant’s Brief, p. 23)

(iii) Failure to establish uniform scoring standards

Appellant next argues that the scoring of its Applications was compromised by the lack of

⁶ OMM’s brief, pgs. 49-50.

uniform standards and the overly subjective way that applications were evaluated. Appellant reiterates here that scoring committee members were not provided specific guidance on how to use or award points pursuant to the scoring rubric, which left the scorers with far too much individual discretion. Appellant cites, by way of example, Ms. Podolak's testimony that an applicant would score in the "meets expectations" category if it satisfied statutory and regulatory requirements. Yet, Mr. McNulty testified that if a dispensary applicant's application disclosed that the applicant had only the statutory minimum of \$150,000 in capital, he would have scored that application an "F" or "below expectations." Similarly, Ms. Lewis testified that even a 100% minority-owned operation would not garner a perfect score for diversity.

Appellant also argues that even though Ms. Lewis was aware of the requirement that applications were to be kept confidential, she shared them with upwards to five members of her staff who were not on the scoring committee and received no training, and then relied on their input to score the applications. This is especially disturbing in light of Ms. Lewis' testimony that she does not recall if she distributed copies of the Act or temporary regulations to her staff. (N.T. 402) In addition, Ms. Lewis did not use the standardized scoring rubric provided to her during training, or consider the five categories in the Standardized scoring rubric to score the Diversity section of the applications. Instead, she developed her own rubric, to which no applicant, including Appellants, had access. The evidence supports Appellant's claim that Ms. Lewis also deducted significant points from Appellant's Applications for including information that she "could not verify" despite the application only calling for a narrative and including no instruction of the need to provide supporting information or documentation.

OMM concedes that the scoring of applications was subjective in some respects. Counsel for the OMM acknowledges, "Of course it was. The Evaluation Committee members are human,

and it is of little surprise that each scorer would view applications differently.” (OMM’s brief, p. 53) The OMM defends by reiterating that the standardized scoring employed by the OMM and implemented in the scoring process, was to insure consistency and fairness throughout the scoring. Yet, it has already been established that no specific training or guidance on how to use or award points pursuant to this rubric was provided. In addition, Ms. Lewis did not use this standardized scoring rubric.

The OMM argues, nonetheless, that Ms. Lewis specifically testified that the diversity rubric utilized by her in scoring the Diversity section was “created based upon adherence to the Medical Marijuana Act and the temporary regulations.”⁷ However, Ms. Lewis’ testimony is not particularly trustworthy, as it is undermined by the fact that she failed to adhere to the training she received. Ms. Lewis ignored the mandates of her training that she not discuss the applications or scoring with anyone; she ignored the mandates of her training that all determinations must be based only on the application (not upon views of others who assisted her in her review of the applications); and she ignored the mandates of her training that she comply with the confidentiality agreement. (DOH Exhibits 5) Considering these revelations, the fact that no member of the scoring committee, other than Ms. Lewis, scored the Diversity section of Appellant’s Applications, calls into question the integrity of the scoring process for this section, and Appellant’s scores. With the point differentials at issue between Appellant’s scores and the top scores of the applicants who were awarded dispensary permits in Northampton and Lehigh Counties, this is significant because the Diversity section of the dispensary permit application was worth 100 points of an applicant’s total score. Appellant scored only 32 points on both Applications.

⁷ OMM’s Brief, p. 52.

(B) MISAPPLICATION AND OVERRIDE OF ACT AND TEMPORARY REGULATIONS

(i) *Scorers Imposed Standards and Criteria Not Found Within the Act or Temporary Regulations*

Appellant next argues that the testimony of Mr. McNulty reveals that several errors of law were committed while scoring Appellant's Applications. In support of this argument, Appellant notes that the Act specifically states: "Before issuing an initial permit under this paragraph, the department shall verify that the applicant has at least \$150,000 in capital, which must be on deposit with a financial institution." Yet, Mr. McNulty testified that applicants who met the \$150,000 threshold for capital requirements, would have received an "F" score from him on the scoring rubric.

Specific to Appellant's Applications, the evidence reveals that Appellant had \$6,900,000.00 in cash on deposit with Wells Fargo Bank – 46x the statutory minimum. The evidence does not disclose what score Mr. McNulty personally assigned to Appellant's Applications. However, the Capital Requirements section of the dispensary permit application was worth 75 points of an applicant's total score. Appellant scored only 60.60 out of 75 points on its Lehigh County Application, and 61.80 out of 75 points on its Northampton County Application. With the point differentials at issue, this, too, is significant because Mr. McNulty testified that he deducted points from Appellant's score because Appellant's \$6,900,000.00 in cash on deposit with Wells Fargo Bank was subject to an escrow agreement between Appellant's investors and the bank. According to McNulty, Appellant's capital was not as "liquid" as McNulty would like to see. However, Mr. McNulty concedes that neither the Act nor the temporary regulations require that an applicant have at least \$150,000 in *liquid* capital. (N.T. 186) Mr. McNulty also concedes that

Appellant *did* show a deposit with the bank as part of its Applications, and that Appellant's Applications specifically state that its funds "will be immediately released upon award of a permit" to Appellant. Even so, according to Mr. McNulty, "anything outside of cash in the bank not subject to any agreement would be looked at as a minus." (N.T. 214)

The OMM argues that Appellant's "attempt to assign significance to the Department or OMM's consideration of things not expressly contained in the Act or Temporary Regulations is inconsequential to this appeal" (Appellee's Brief, p. 56) because the Act contains "no less than three express authorizations, and a myriad of other implicit authorizations, for the Department and OMM to require or consider anything not enumerated in the Act that it deems appropriate to the award of medical marijuana permit." *Id.* The Hearing Officer disagrees. OMM is correct that section 602(a) of the Act provides that applications for permits "shall include, *inter alia*, "[a]ny other information the [D]epartment may require, 35 P.S. §10231.602(a), and that sections 603 (a.1) and (a.1)(d), provide that in making determinations as to whether to grant or deny permits, "the [D]epartment shall determine that. . . [t]he applicant satisfies any other conditions as determined by the [D]epartment," and "[a]ny other factor the [D]epartment deems relevant." 35 P.S. §§10231.603(a.1) and (a.1)(d). However, applicants must be notified what other information, conditions, or factors the Department will be considering; the Department cannot just *ad hoc* create these requirements.

Appellant also argues that Mr. McNulty erred by awarding up to 30 points to applicants under the Community Impact section of the application, whose dispensaries were in an Act 47 municipality. The Community Impact section of the dispensary permit application was worth 100 points. Appellant scored only 38 points on its Lehigh County Application, and 43 points on its Northampton County Application. Evidence was adduced at the hearing that unveiled that neither

the Act, temporary regulations, Dispensary Permit Application or its instructions notified applicants that 30 out of 100 points would automatically be awarded to applicants whose dispensaries are in an Act 47 municipality. The following discourse during cross-examination disclosed this revelation:

Question: Okay. - - You testified - - we can agree that a large factor that was considered for the Community Impact section was whether or not the dispensary was located in an Act 47 municipality, correct?

Answer: Correct.

(Transcript, p. 214, lines 20-24)

...
Question: It was your testimony earlier that the dispensary application advised applicants that they had to check whether or not their dispensary was in an Act 47 municipality, correct?

Answer: Correct.

Question: Okay. Can you point me to where in the application [Act 47] is referenced where there's a check mark?

...
Answer: It's possible I may be messing this up with the grower processor [application] that included it as a question specifically stating, "Is the medical marijuana organization project located in a financially distressed municipality?" It's possible that that question was not on the dispensary application.

(Transcript, p. 215, lines 5-12 and 20-25)

Question: Okay. I want you to take your time and review it as long as you need to so you're definitive with your answer. . . [b]ecause I'm going to ask you, yes or no, if there's a reference to Act [47] with this application?

Answer: Yes, it appears that was only on the grower processor application.

(Transcript, p. 216, lines 1-7 and 13-14)

...
Question: And would you agree that Act 47 is not referenced as a

criteria in the Medical Marijuana Act itself?

Answer: - - Without fully reviewing it I believe you are correct.

(Transcript, p. 217, lines 21-25)

Question: And how 'bout the regulations?

Answer: Again, I believe you're correct.

(Transcript, p. 218, lines 1-2)

The evidence similarly reveals that Mr. McNulty and other members of the scoring committee from DCED developed a scoring rubric for the Community Impact section of the application that awarded 15 points out of 100 if a dispensary was in a county or municipality that has an unemployment rate 25% or greater than the state average. (DOH Exhibits 4c) Mr. McNulty agrees that there similarly was no notice to any of the applicants of this criteria. (N.T. 224) The Hearing Officer agrees with the Appellant that these scoring errors, in combination with the errors already identified, are sufficient in magnitude to warrant a rescore of the Appellant's Applications.

(ii) Scorers Violated Requirements of the Act and Temporary Regulations

Appellant lastly argues that in addition to imposing and evaluating individual criteria not set forth in the Act or temporary regulations, scorers, like Ms. Lewis, acted contrary to the requirements contained within the temporary regulations, specifically, section 1141.22(b)(12), which provides that information relating to an applicant's diversity plan that is marked confidential proprietary or trade secret is considered confidential. The evidence relied upon here has already been discussed. The Hearing Officer agrees with the Appellant that Ms. Lewis disregarded both the confidentiality provisions of the temporary regulations, and the expectations of the OMM when scoring the Diversity Section of Appellant's Applications. Applications were to be kept confidential, but Ms. Lewis made copies of the applications for her staff to review,

who then discussed and evaluated the applications with Ms. Lewis, with Ms. Lewis allegedly providing the final score.

The Hearing Officer finds that the Appellant has satisfied its burden of proof. The evidence presented during the two days of hearing establishes that significant errors were made by the scoring committee members who testified, that are inconsistent with the Act and temporary regulations. As stated *supra.*, with only a 24.2-point differential between Appellant's score and the top score of the applicant who was awarded a dispensary permit for Northampton County, and a 52.4-point differential between Appellant's score and the top score of the applicant who was awarded a dispensary permit for Lehigh County, Appellant has identified several irregularities relating to scoring and/or the scoring process that, when viewed in totality, weigh in favor of reconsideration.

(C) The Proposed Remedy of a Rescore does not Provide Meaningful Relief

Appellant argues that the remedy of a rescore does not provide it with meaningful relief because the OMM has not divulged what will happen if Appellant ultimately scores higher than the winning applicants in Appellant's regions. Appellant finds it difficult to imagine that it will be awarded a Phase 1 permit in the region where it applied because the Act limits the Phase 1 award of dispensary permits to 50. These permits have already been issued, and the permittees have been setting up their dispensaries uninterrupted over the past year when Appellant was going through the administrative hearing process.

The Hearing Officer also questions the relevance of the proposed remedy of a rescore, when all allotted permits in Phase 1 have been issued, and the OMM has already moved forward with Phase II permitting. However, as stated, *supra.*, the authority granted to the Hearing Officer by the Department's Deputy Secretary, Health Planning and Assessment, is limited. The Office

of Hearing Examiners is not authorized to recommend that the Department issue a permit to Appellant.

Because the Hearing Officer is limited to recommending that the Agency Head order the Office of Medical Marijuana to re-score an application in accordance with the Medical Marijuana Act, and to recommend any other relief authorized by law, that is the recommendation that is made.

It is recommended that both Appellant's Applications be re-scored in accordance with the Medical Marijuana Act and temporary regulations. It is further recommended that the re-scoring of the Applications not include the same scoring committee members, particularly Ms. Lewis and Mr. McNulty, who have already scored the Applications and underwent extensive direct and cross-examination during this administrative process. It is further recommended that the Agency Head work with the OMM to amend its regulations to allow additional dispensary permits to be issued to applicants who *successfully* pursue administrative appeals following a permit denial, and ultimately score higher than the top score of the applicant who was awarded a dispensary permit in the medical marijuana region at issue in their administrative appeal.

The following Order will therefore issue:

**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HEALTH**

**KEYSTONE RELEAF, LLC.,
APPELLANT**

vs.

**DEPARTMENT OF HEALTH,
OFFICE OF MEDICAL MARIJUANA
APPELLEE**

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**DOCKET NO. MM 17-095 D
DOCKET NO. MM 17-096 D**

(CONSOLIDATED)

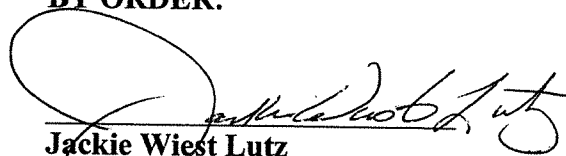
PROPOSED ORDER

AND NOW, this 29th day of **October 2018**, in accordance with the foregoing findings of fact, conclusions of law and discussion, it is **ORDERED** that Appellant's Dispensary Permit Applications for Lehigh and Northampton Counties shall be re-scored in accordance with the Medical Marijuana Act and temporary regulations.

It is further **ORDERED** that the re-scoring of Appellant's Applications shall not include the same scoring committee members, particularly Ms. Lewis and Mr. McNulty, who have already scored the Applications during Phase I of the permitting process.

It is lastly **ORDERED** that the Agency Head shall direct the Office of Medical Marijuana to amend its temporary regulations to allow additional dispensary permits to be issued to applicants who *successfully* pursue administrative appeals following a permit denial, and, upon re-score, ultimately score higher than the top score of the applicant who was awarded a dispensary permit in the medical marijuana region at issue in their administrative appeal.

BY ORDER:


**Jackie Wiest Lutz
Chief Hearing Examiner**

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Date of mailing:

October 30, 2018